

R.D. # 0013-99
Union, N.J.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

CMS MID-ATLANTIC, INC.¹
Employer

and

SIEGFRIED TURKEWIC, an Individual
Petitioner

CASE 22-RD-1275

and

**SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 74, AFL-CIO**
Union

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,² the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

¹ The name of the Employer appears as amended at the hearing.

² A brief filed by the Employer was fully considered. No other briefs were filed.

2. The Employer is engaged in commerce within the meaning of the Act and will effectuate the purposes of the Act to assert jurisdiction herein.³
3. The labor organization involved claims to represent certain employees of the Employer.⁴
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All grounds supervisors, grounds foremen, backhoe operators, truck drivers and laborers employed by the Employer at its Hollywood Memorial Park, Union, New Jersey location, excluding all office clerical employees, guards and supervisors as defined in the Act and all other employees.⁵

The parties are in agreement that the appropriate unit in this matter should include all grounds supervisors, grounds foremen, backhoe operators, truck drivers and laborers. Likewise, they agree that all office clerical employees, guards and supervisors as defined in the Act should be excluded. At issue is the supervisory status of the Petitioner,

³ The Employer is engaged in cemetery management services at its Hollywood Memorial Park, Union, New Jersey location, its only facility involved herein.

⁴ Service Employees International Union, Local 74, AFL-CIO, herein called the Intervenor, was permitted to intervene based on its collective bargaining relationship with the Employer. In this regard, the record reveals that the Intervenor is the successor labor organization to Cemetery Workers & Greens Attendants Union, Local 365, SEIU, AFL-CIO, which had been certified as the exclusive collective bargaining agent of the employees herein involved by the undersigned on April 6, 1998, in Case 22-RC-11524. The parties stipulated and, I find, that the Intervenor is a labor organization within the meaning of Section 2(5) of the Act.

⁵ The unit description is in accord with the stipulation of the parties and the certified unit in Case 22-RC-11524, which I find to be appropriate for purposes of collective bargaining. There are approximately 12 employees in the unit.

Siegfried Turkewic, whom the Intervenor, contrary to the Employer and the Petitioner, assert is a supervisor within the meaning of the Act. It also appears that the Intervenor contends that Vincent Blando, who has the same duties and functions as Turkewic, is a supervisor within the meaning of the Act.

The record reveals that the Employer operates a cemetery where it is engaged in interments, entombments and maintenance work. The record reveals that Mario Cutugno, Vice-President for Cemetery Operations, has day to day responsibility for the operation of the cemetery. Reporting to Cutugno are Bill Bell and two other unnamed individuals whom the parties agree are management personnel and not part of the unit. The Intervenor currently represents a unit of all grounds supervisors, grounds foremen, backhoe operators, truck drivers and laborers excluding all office clerical employees, guards and supervisors as defined in the Act. The record reveals that Turkewic and Blando are employed as grounds supervisors.

The record reveals that grounds supervisors do not possess the authority to hire, fire, transfer, layoff or recall employees, nor to recommend such actions. Further, there is no evidence that grounds supervisors are involved in the hiring process by interviewing employees, recommend promotions or raises or have authority to grant time off to employees. Grounds supervisors do not schedule employees for work or determine their hours; they do not have authority to assign over time, resolve employee grievances, evaluate employees' work performance or discipline employees. Grounds supervisors do not attend supervisors' meetings. The record reveals that work assignments are generated by "higher management" and distributed by the grounds supervisors. In this connection, the grounds supervisors distribute work orders to the appropriate crew such as the digging crew, tent crew and mausoleum crew as the particular work order demands. The

record reveals that grounds supervisors, as other employees, may report employee misconduct to management for consideration. It is undisputed that grounds supervisors are obligated to report misconduct when they become aware of it. There is no evidence that grounds supervisors make any recommendations as to disciplinary matters. An incident described in the record concerning employee, Mario Dennis, occurring about six weeks prior to the hearing in this matter, revealed that grounds supervisor Turkewic, merely reported alleged misconduct by Dennis to management which resulted in Dennis' termination. There is no evidence that Turkewic made any recommendations.

The Intervenor relies on several factors to support its assertion that grounds supervisors are statutory supervisors. In this regard, it asserts that the two grounds supervisors at issue here do not wear solid blue shirts like other employees but rather wear blue and white striped shirts, although all employees wear the same color pants. In addition, grounds supervisors perform some duties not performed by other unit employees such as handling administrative paperwork. The record does not describe with clarity the type of paperwork involved although it appears that grounds supervisors initial completed work orders and time cards that are incorrect. In addition, grounds supervisors have use of desks and a telephone in a field office where supplies used by employees are maintained. Grounds supervisors have keys to this office. The paperwork performed by grounds supervisors is kept in this office.

The record reveals that grounds supervisors like all other employees share the same benefits such as medical, vacation, holidays, sick leave and personal time. The record discloses that grounds supervisors work in crews together with other unit employees, spend 85% to 90% of their work time performing the same physical tasks as all other unit employees, such as digging graves, operating the backhoe, setting

monuments, maintaining the grounds and performing electrical and plumbing work, as needed. Grounds supervisors, like other employees, punch a time clock and share the same lunchroom. However, unlike other employees, they are salaried, not hourly. With regard to their pay, the record does not indicate what it is or how it compares to the pay of other employees. Turkewic testified, however, that there are some employees who earn as much as he does and some that earn more.

Section 2(11) of the Act defines a supervisor as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In *Providence Hospital*, 320 NLRB 717, 725 (1996), the Board held, "In enacting Section 2(11) of the Act, Congress distinguished between true supervisors who are vested with 'genuine management prerogatives,' and 'straw bosses, lead men and set-up men' who are protected by the Act even though they perform 'minor supervisory duties.'" *Id.* at 724 citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (quoting S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947)). The legislative history instructs the Board not to construe supervisory status too broadly because an employee who is deemed a supervisor loses the protection of the Act. See *Providence Hospital*, *supra*, 320 NLRB at 725; *Warner Co. v. NLRB*, 365 F. 2d 435, 437 (3rd Cir. 1966), cited in *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1073 (1985). While the possession of any one of the functions enumerated in Section 2(11) is sufficient to establish supervisory status, Section 2(11) requires that a supervisor must perform those functions with independent judgment, as opposed to in a routine or clerical manner. *Bay Area-Los Angeles Express*, *supra* at 1073 and cases cited therein. The burden of proving supervisory status rests on the party

contending that status. *Midland Transportation Co.*, 304 NLRB 4 (1991); *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979). Absent detailed, specific evidence of independent judgment, mere inference or conclusionary statements without supporting evidence are insufficient to establish supervisory status. *Quadres Environmental Co.*, 308 NLRB 101, 102 (1992)(citing *Sears Roebuck & Co.*, 304 NLRB 193 (1991)). Further, whenever evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established on the basis of those indicia. *The Door*, 297 NLRB 601 (1990)(quoting *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989)). It is well established that an employee's title, standing alone is not indicative of supervisory status for purposes of the Act. *John N. Hansen Co.*, 293 NLRB 63 (1989); *Waterbed World*, 286 NLRB 425 (1987). The Board in *Providence Hospital* quoted with approval the court in *NLRB v. Security Guard Service*, 384 F. 2d 143, 151(5th Cir. 1967):

If any authority over someone else, no matter how insignificant or infrequent, made an employee a supervisor, our industrial composite would be predominantly supervisory. Every order-giver is not a supervisor. Even the traffic director tells the president of a company where to park his car.

Based upon the above, and the record as a whole, noting that grounds supervisors share similar terms and conditions of employment as other unit employees, and the absence of probative evidence that they possess the independent authority to hire, fire, discipline or grant time off to employees, I find that they do not possess any indicia of supervisory status that would warrant their exclusion from the unit. *Spector Freight System, Inc.*, 216 NLRB 551 (1975); *North Shore Weeklies, Inc.*, 317 NLRB 1128 (1995); see also *Browning Ferris, Inc.* 275 NLRB 292(1985). It is the Intervenor's burden to prove that the grounds supervisors are supervisors as defined by the Act, and the Intervenor has failed to meet this burden. I therefore conclude that the grounds

supervisors are not supervisors and, therefore, they will be included in the unit found appropriate herein.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained the status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **Service Employees**

International Union, Local 74, AFL-CIO

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election

should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, three (3) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the NLRB Region 22, 20 Washington Place, 5th Floor, Newark, New Jersey 07102-3110, on or before June 30, 1999. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by July 7, 1999.

Signed at Newark, New Jersey this 23rd day of June 1999.

/s/William A. Pascarell

William A. Pascarell, Regional Director
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